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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 478

MARK GRAVES, JOHN J. MERRILL AND JOHN P.
HENNESSY, AS COMMISSIONERS CONSTITUTING
THE STATE TAX COMMISSION OF THE STATE
OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, UPON
THE RELATION OF JAMES B. O'KEEFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
NEW YORK

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1938.

CERTIORARI GRANTED DECEMBER 19, 1938.

5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No.

4

MARK GRAVES, JOHN J. MERRILL AND JOHN P.
HENNESSY, AS COMMISSIONERS CONSTITUT-
ING THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK
UPON THE RELATION OF JAMES B. O'KEEFE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW YORK

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[fol. a]

IN COURT OF APPEALS OF NEW YORK

THE PEOPLE, etc., ex Rel. JAMES B. O'KEEFE, Respondents,
ag't.

MARK GRAVES & ORS., &c., STATE TAX COMMISSION OF THE
STATE OF NEW YORK, Appellants

REMITTITUR—July 7, 1938

Be it Remembered, That on the 10th day of May, in the year of our Lord one thousand nine hundred and thirty-eight, Mark Graves and others &c.—State Tax Commission of the State of New York, the appellants in this cause, came here unto the Court of Appeals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James B. O'Keefe, the respondent in said cause, afterwards appeared in said Court of Appeals by Daniel McNamara, Jr., his attorney.

[fol. b] Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein, of counsel for the appellants, and by Mr. Daniel McNamara, Jr. of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs on the authority of *People ex rel. Rogers v. Graves*, (299 U. S. 401).

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs on the authority of *People ex rel. Rogers v. Graves* (299 U. S. 401), as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the

State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Clerks' certificates to foregoing paper omitted in printing.

[fol. c] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY
THE PEOPLE OF THE STATE OF NEW YORK upon the Relation
of JAMES B. O'KEEFE, Relator,
against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY,
as Commissioners Constituting the State Tax Commission
of the State of New York, Respondents

JUDGMENT OF AFFIRMANCE—Filed August 19, 1938

The above named respondents having appealed to the Court of Appeals from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, entered herein in the office of the Clerk of Albany County on the 17th day of January, 1938, annulling the final determination of the respondents denying the application of the relator for a revision and resettlement of the computation of his personal income tax for the calendar year 1934, and for a refund of the sum of \$57.28, the said personal income tax paid by the relator for the calendar year 1934, and in all respects granting the said application and directing that the respondents refund to the relator the sum of \$57.28, the said personal income tax paid by the relator for the calendar year 1934, and that the relator recover of the respondents the sum of \$50.00 costs and his disbursements of this proceeding, and that the relator have execution therefor, and the Court of Appeals having heard the said appeal and ordered and adjudged that the final order, so appealed from, be affirmed, with costs, and further ordered that the remittitur from the said court be remitted to this court, [fol. d] to be proceeded upon and enforced according to

law, and the remittitur from the Court of Appeals having been duly filed in the office of the Clerk of Albany County, and an order having been entered thereon by this court on the 5th day of August, 1938, making the said order and judgment of the Court of Appeals the order and judgment of this court and directing that the final order entered herein on the 17th day of January, 1938, be affirmed, with costs, and that a judgment of this court be entered herein affirming said final order, with costs of said appeal to be taxed against the respondents, and the said order having been duly filed in the office of the Clerk of Albany County on the 5th day of August, 1938,

Now, on Motion of Daniel McNamara, Jr., attorney for the relator, it is hereby

Adjudged that the final order in this proceeding, entered herein on the 17th day of January, 1938, be and the same hereby is affirmed, and that the relator, James B. O'Keefe, recover of the respondents, Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, the sum of \$257.08, the amount of his costs herein as taxed, and that the relator, James B. O'Keefe, have execution therefor.

Dated: August 19, 1938.

John A. Knox, Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 1] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation
of James B. O'Keefe, Relator,
against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY,
as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

STATEMENT UNDER RULE 234

This proceeding was commenced on April 17th, 1936, by the service upon respondents of a notice of motion dated April 15th, 1936, for an order directing the issuance of a writ of certiorari. The order was entered upon consent on April 18th, 1936. The writ of certiorari was allowed on April 18th, 1936, and issued on April 20th, 1936.

The writ of certiorari was served upon respondents on April 23rd, 1936. Respondents filed their return to the writ in the office of the Clerk of Albany County on May 7th, 1936.

Relator appeared by Bogart, Calise & Di Prima, Esqs. Respondents appeared by John J. Bennett, Jr., Esq., Attorney General of the State of New York. There has been no change of attorneys or parties herein.

[fol. 2] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY
ORDER GRANTING WRIT OF CERTIORARI—April 18, 1936

On reading and filing the petition of James B. O'Keefe, verified on April 7, 1936; the notice of motion herein; proof of service of said petition and notice of motion upon the State Tax Commission and a stipulation signed by said Tax Commission by Mark Graves, president, and by the attorney for said Tax Commission, waiving the filing of an undertaking for costs and charges which may accrue against relator in the prosecution of this writ and it appearing that John J. Bennett, Jr., Attorney General of the State of New York and attorney for the State Tax Commission, has duly consented to the granting of a writ of certiorari as prayed for in said petition;

Now, on motion of Bogart, Calise & Di Prima, the attorneys for petitioner, it is

Ordered, that a writ of certiorari be issued out of and under the seal of this Court as prayed for in said petition directed to Mark Graves, John P. Hennessey and John J. Merrill, constituting the State Tax Commission of the State of New York, returnable at the office of the clerk of the Supreme Court, in and for the County of Albany, within twenty days after the service thereof, to review the taxation [fol. 3] set forth in the petition herein.

Enter.

Francis Bergan, J. S. C.

Consent is hereby given to the entry of the within order granting a writ of certiorari.

Dated, New York, April 17th, 1936.

John J. Bennett, Jr., Attorney General of the State
of New York, Attorney for State Tax Commission.
Bogart, Calise & Di Prima, Attorneys for Petitioner.

IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

WRIT OF CERTIORARI

Whereas, we have been informed by the petition of James B. O'Keefe, verified on April 7, 1936, that theretofore said petitioner James B. O'Keefe had made a claim for refund of the income tax in the sum of \$57.28 which had been paid by him for the year 1934 and that thereafter, on March 26, 1936, said Commission made its determination denying said application, and

Whereas, it is alleged by the petitioner that in refusing said application for a refund, injustice has been done to [fol. 4] the said petitioner James B. O'Keefe herein and that said tax so paid and not refunded as aforesaid, was erroneous and illegal and we being willing to be certified of your proceedings in the premises as such Tax Commission in imposing and exacting such tax, and in failing to grant such application for the refund of the same, and in all things relating thereto do command you to certify and return to the office of the County Clerk of the County of Albany, within twenty days after service of this writ upon you, all and singular the accounts and all the evidence before you upon the application for revision, and readjustment and refund of said tax, and all and singular your proceedings, decisions and actions in the premises, with the dates thereof, and all the accounts, affidavits and all the evidence submitted to you or which were before you in, of or concerning the said matter or matters of the said account for taxes aforesaid against said James B. O'Keefe to the end that said account or accounts, revision, readjustment or refund thereof, and your decision or decisions thereon, may be revised and corrected by this court according to law.

Witness, Honorable Francis Bergan, Justice of the Supreme Court, at the County Courthouse in the City of Albany, this 20th day of April, 1936.

John A. Knox, Clerk.

The foregoing writ of certiorari allowed this 18th day of April, 1936.

Francis Bergan, Justice.

[fol. 5] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

NOTICE OF MOTION FOR WRIT OF CERTIORARI

SIRS:

Please take notice, that upon the petition of James B. O'Keefe, verified the 7th day of April, 1936, and upon Schedule A, and a stipulation waiving the filing of an undertaking for costs hereto annexed, a motion will be made at a Special Term of this court, to be held at the courthouse in the County of Albany, on the 29th day of April, 1936, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing the issuance of a writ of certiorari to review the taxation set forth in the petition herein, and for such other relief as to this Court may seem just and proper.

Dated, New York City, April 15th, 1936.

Yours, etc., Bogart, Calise & Di Prima, Attorneys
for Relator, Office & P. O. Address, 38 Park Row,
Borough of Manhattan, New York City.

To Mark Graves, John J. Merrill and John P. Hennessey,
as Commissioners constituting the State Tax Commission
of the State of New York, Albany, New York.

[fol. 6] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

PETITION OF JAMES B. O'KEEFE FOR WRIT OF CERTIORARI

The petition of James B. O'Keefe, respectfully alleges:

First. The petitioner, at the time herein mentioned, resided in the City of Long Beach, Nassau County, State of New York.

Second. The defendants are the Commissioners constituting the Tax Commission of the State of New York.

Third. For the year 1934, petitioner duly made a personal income tax return, pursuant to the Tax Law of the State of New York, and paid to the Tax Commissioners the sum of Fifty-seven and 28/100 (\$57.28) Dollars as the amount of tax payable under said law.

Fourth. Thereafter and on or about August 16, 1935, petitioner duly made application, pursuant to Section 374 of

the Tax Law, for a refund of the foregoing tax and on March 26, 1936, the Tax Commission made its determination denying his application. A copy of said determination, marked Schedule A, is hereto annexed.

Fifth. Upon information and belief, petitioner alleges that such determination is erroneous inasmuch as the tax paid for the year of 1934 was based on a net income of Two thousand nine hundred eight and 54/100 (\$2908.54) Dollars of which the sum of Two thousand two hundred forty-six and 66/100 (\$2246.66) Dollars was salary earned as an attorney at law in the employ of the Home Owners' Loan Corporation; that said corporation is an instrumentality of [fol. 7] the United States Government engaged in the performance of a governmental function; that such part of petitioner's net income, namely, Two thousand two hundred forty-six and 66/100 (\$2246.00) Dollars, as was earned as an employee of the Home Owners' Loan Corporation is exempt from the New York State Income Tax; that the balance of petitioner's net income, namely, Six hundred sixty-one and 88/100 (\$661.88) Dollars was less than the One thousand (\$1,000.00) Dollars personal exemption to which he is entitled by law; that, as a result of the foregoing, petitioner had no taxable balance in 1934.

Sixth. Annexed hereto is a stipulation signed by the attorneys for the respective parties hereto, and the respondents in person, waiving the filing of an undertaking for costs, as provided by Section 375 of the Tax Law of the State of New York.

Seventh. No previous application for the writ herein sought has been made to any Court or Judge.

Wherefore, petitioner prays that a writ of certiorari issue out of this Court to the defendants as Commissioners constituting the State Tax Commission of the State of New York commanding them to make return to said writ pursuant to law, and that said determination of the State Tax Commission be reviewed and said refund granted and for such other relief as may be proper.

Dated, New York City, April 4th, 1936.

James B. O'Keefe, Petitioner.

(Verified on April 7th, 1936, by James B. O'Keefe, as the Petitioner.)

[fol. 8] SCHEDULE "A", ANNEXED TO PETITION OF JAMES B.
O'KEEFE

STATE OF NEW YORK, THE STATE TAX COMMISSION

In the Matter of Claim for Refund and Application for
Revision of the Personal Income Tax of JAMES B.
O'KEEFE for the Year 1934

Return of income on behalf of the above named taxpayer for the calendar year 1934 having been duly filed at the time when required by statute in accordance with the provisions of Article 16 of the Tax Law, and the tax computed thereon in the amount of \$57.28 having been paid at the time of filing; and thereafter on the 17th day of August, 1935, a claim for refund of the entire amount of tax paid having been duly filed and accepted as an application for revision under Section 374 of the Statute; and the matter having come on for formal hearing before Cortland A. Wilbur, Director, and Roy H. Palmer, First Assistant Director, duly designated under the provisions of Section 171 of the Tax Law to hold formal hearings, and such hearing having been had at the Albany office of the Commission, State Office Building, Albany, on October 14, 1935, which formal hearing was continued before Roy H. Palmer, First Assistant Director, at the New York Office of the Commission, 80 Centre Street, New York City, on February 28th, 1936; and the taxpayer having been represented by Bogart, [fol. 9] Calise & Di Prima, attorneys and counsellors-at-law, 38 Park Row, New York City, Mark A. Bogart, and Eli Phillips of counsel; and the taxpayer through his counsel having presented argument thereon and all questions of law and fact having been duly considered by the Commission, and Hon. Mark Graves, Commissioner, having rendered an Opinion herein, which is annexed hereto and made a part of this determination, it is hereby

Determined: that the computation of the tax contained in the return filed by the taxpayer for the year 1934 was correct and that the tax paid upon the filing of said return as hereinbefore stated was due and owing under the provisions of the law, and does not include any taxes or other charges which should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and

that the taxpayer is not entitled to any further resettlement and revision of said tax.

Dated, Albany, N. Y., March 26, 1936.

The State Tax Commission, (Signed) Mark Graves,
Commissioner. (Signed) John P. Hennessey, Com-
missioner.

[fol. 10] OPINION BY GRAVES, COMMISSIONER, ANNEXED TO
SCHEDULE A

James B. O'Keefe, the taxpayer herein, a resident of the State of New York, duly filed his income tax return for the calendar year 1934 on or before the 15th day of April, 1935, and at the time of filing paid the sum of \$57.28, the entire amount of tax computed to be due on the face of the return.

Included in gross income reported in such return, and at Item 21 thereof, was an amount of \$2,246.66 stated to be compensation paid to the taxpayer by Home Owners' Loan Corporation, 350 Fifth Avenue, New York City. The taxpayer's occupation or trade was stated in the return to be that of attorney-at-law.

Under date of August 17th, 1935, the taxpayer filed with this Department a claim for refund in the amount of \$57.28, the total tax paid. The basis of such claim was that the said sum of \$2,246.66, the salary paid to the taxpayer, as an attorney-at-law, by the Home Owners' Loan Corporation was not taxable, and should not have been included in gross income, and that the elimination thereof would result in no tax being due for the year in question.

The taxpayer's claim that such income is not subject to the New York State Personal Income Tax is based upon his assertion that the Home Owners' Loan Corporation is an instrumentality of the United States Government and that during 1934 he was an employee of the Federal Government, engaged in the performance of a governmental function.

From the testimony taken at a formal hearing before Deputy Commissioner Cortland A. Wilber on October 14th, [fol. 11] 1935, which hearing was continued before Assistant Director Roy H. Palmer on February 28th, 1936, the following facts were brought out; namely, that during the year 1934 the taxpayer was employed as an examining attorney by said Home Owners' Loan Corporation; that he started work on January 12th, 1934 at a compensation of \$80.00

per month; that his duties as examining attorney included the reading of titles, i. e., the examination of certificates sent in by Title Companies before sending the file to the closing attorney to see if there were any defects in title, to examine the certificates of title after the return of the file by the closing attorney prior to the loan closing, and various similar duties; that he received his appointment verbally from one Leo P. Dorsey, State counsel for the Corporation; that he tried no Civil Service examination for the position; that he was paid semi-monthly by check of Home Owners' Loan Corporation signed by P. J. Mahoney, Treasurer of the Home Owners' Loan Corporation, drawn on the Treasury of the United States; that the salary checks were the checks of the Home Owners' Loan Corporation.

The Department has raised no question that the taxpayer was so employed throughout the year 1934 by the Home Owner's Loan Corporation and that he received a salary as reported from such Corporation. The sole question is, was this salary exempt from taxation?

Section 359, paragraph 2-f of Article 16 of the Tax Law, excludes from gross income:

"Salaries, wages and other compensation received from [fol. 12] the United States of officials or employees thereof, including persons in the military or naval forces of the United States."

The Law creating the Home Owners' Loan Corporation as amended is entitled "Home Owners' Loan Act of 1933". It provides in Section 4-(a) thereof that the Federal Home Loan Bank Board (created by Congress under the Federal Home Loan Bank Act) was:

"Authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation which shall be an instrumentality of the United States, which shall have authority to sue and be sued in any Court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation."

The Act further provides that the Federal Home Loan Bank Board shall determine the minimum amount of capital stock of the corporation which may not exceed an aggregate of \$200,000,000. It also provides that such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and the Reconstruction Finance Corporation was authorized to make available to the Secretary of the Treasury the sum of \$200,000,000. for such purpose. [fol. 13] The Home Owners' Loan Corporation was also empowered to issue bonds in an aggregate amount not to exceed \$4,750,000,000. to be sold by the corporation to obtain funds for carrying out the purposes of the Section which bonds were to be fully and unconditionally guaranteed both as to principal and interest by the United States.

Among the other purposes for which the corporation was organized were the following:

(a) For a period of three years after the date of the enactment of the Act

(1) To acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate recorded or filed or executed prior to the date of the enactment of the law and

(2) In connection with any such exchange to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction and

(b) For a period of three years from the date of the enactment of the Act to make loans in cash in cases where property is not otherwise encumbered, but in no case should such loan exceed fifty per centum of the value of the property securing the same; such loan to be secured by duly recorded home mortgage bearing interest and

(c) In a case where the holder of a home mortgage or other obligation or lien eligible for exchange for the corporation bonds does not accept such bonds in exchange, to make cash advances to such home owner in an amount not [fol. 14] to exceed forty per centum of the value of the property.

Various limitations and rules for the making of such loans as are indicated above are also included in the Act. The pe-

itioner at the formal hearing introduced in evidence excerpts from the Manual of Rules and Regulations of the Home Owners' Loan Corporation effective October 10th, 1934 and corrected to August 1st, 1935. While such evidence was received, it is evident that the Rules and Regulations and the matter contained in the excerpts submitted are but self serving declarations of the Corporation itself. We must look to the statute to determine the purposes and aims of the Corporation and its proper functions.

From the provisions of the law itself it appears that the Home Owners' Loan Corporation when created by the Federal Home Loan Bank Board became a distinct entity, issuing stock, and selling bonds to the public, and having its own Board of Directors. The taxpayer herein was appointed by an officer of the Corporation and became its employee. He performed his duties under the direction of officers of the corporation and received compensation for his services by check of the corporation, signed by its Treasurer, payable out of funds held in the United States Treasury, for the uses of the corporation as provided by the Act.

In a well considered opinion the Attorney General of this State on February 3rd, 1930 held that employees of the United States Shipping Board Emergency Fleet Corporation, and of the United States Food Administration Grain Corporation, were not employees of the Federal Government and that their compensation was subject to tax [fol. 15] under Article 16 of the Tax Law. The Attorney General said in part:

"For its own reasons, the Government has seen fit to carry on these activities indirectly. Instead of turning them over to Departments of the Government, to be carried on by officers and employees of the Government, it has utilized independent corporations—distinct entities with legal personalities. There is no difference between the relations of employees of these corporations to the Government and the relations to the Government of employees of pure business corporations, organized for profit to their stockholders, who happen to make contracts with the United States for supplies. They are not employees of the United States but of the corporations."

Again on May 9th, 1933 the Attorney General rendered an opinion in respect of salaries or wages paid to officers and employees of the Regional Agricultural Credit Cor-

poration of Albany, holding that such officers and employees were not officers and employees of the United States Government but of an entity distinct from it and from any of its departments, and consequently their salaries if earned within the State or received by them as residents of the State, are taxable under the Personal Income Tax Law.

Upon the facts and the law as contained in the opinions of the Attorney General and the decisions of the Courts, I have reached the conclusions:

[fol. 16] (1) That the purposes of the Home Owners' Loan Corporation as set forth in law creating it, and its activities under the provisions of the Act and the Manual of Rules and Regulations above referred to, do not constitute an essential or a usual governmental function. See *People ex rel. Rogers v. Graves*, Appellate Division Third Department, November 13th, 1935, citing *South Carolina v. U. S.*, 199 U. S. 437; *Ohio v. Helvering*, 292 U. S. 360; *Flint v. Stone Tracy*, 220 U. S. 108; *Helvering v. Powers*, 293 U. S. 214, and

(2) That James B. O'Keefe, the taxpayer herein was at no time during the year 1934 an official or an employee of the United States Government, nor was his compensation received from the United States but from a distinct corporate entity, and that the taxpayer was not engaged in the performance of either an essential or a usual governmental function.

Having reached these conclusions, I find no basis under the provisions of Article 16 of the Tax Law for the exclusion from gross income of the compensation received by the taxpayer from the corporation employer.

A determination should issue affirming the denial of the claim for refund filed by the taxpayer for tax paid upon his compensation for the year 1934.

Mark Graves, Commissioner.

Dated — —, —.

[fol. 17] STIPULATION, ANNEXED TO PETITION OF JAMES B.
O'KEEFE

SUPREME COURT, ALBANY COUNTY

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation
of JAMES O'KEEFE, Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
Commissioners Constituting the State Tax Commission
of the State of New York, Respondents

It is hereby stipulated by the attorneys for the respective parties hereto and the respondents in person, that the filing of an undertaking for costs, in compliance with the provisions of Section 375 of the Tax Law of the State of New York, be and the same is hereby waived.

Dated, New York City, April 1st, 1936.

Bogart, Calise & Di Prima, Attorneys for Relator.

John J. Bennett, Jr., Attorney for Respondents.

Mark Graves, Respondent in Person.

[fol. 18] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

RETURN OF RESPONDENTS

The respondents above named, obedient to an order and writ of certiorari duly made and entered herein, hereby make return thereto, consisting of all and singular the accounts and evidence before the State Tax Commission upon the application for revision, readjustment and refund of a certain assessment of income tax against relator, together with all the accounts, affidavits and all the evidence submitted to or which were before the State Tax Commission in, of, or concerning said account for taxes against relator, as follows:

1. New York State Resident Income Tax Return for the calendar year 1934, filed by James B. O'Keefe, verified April 12, 1935.

2. Claim for refund filed by James B. O'Keefe, verified August 16, 1935, for calendar year 1934, amount \$57.28.

3. Application for informal hearing, filed by James B. O'Keefe.

4. Transcript of formal hearing held at Albany, October 14, 1935, to which are appended Exhibits A and B-1.

5. Transcript of formal hearing held at New York February 28, 1936, to which are appended Exhibits C and D.

6. Affidavit of Joseph M. Byrne, verified the 24th day of October, 1935.

7. Letter addressed to Messrs. Bogart, Calise and [fol. 19] Di Prima under date of November 7, 1935, by the United States Employees' Compensation Commission, Washington, D. C.

8. Final determination of State Tax Commission dated March 11, 1936.

Respondents specifically deny each and every allegation contained in the petition herein, except in so far as same are shown to be true by this return.

Respondents allege that the tax imposed upon relator herein was justly and legally imposed under the laws of the State of New York.

In witness whereof, the State Tax Commission hereunto sets its hand and seal this 6th day of May, 1936.

State Tax Commission, Mark Graves, President.
John J. Merrill, Commissioner.

[fol. 20] EXHIBIT 1, ANNEXED TO RESPONDENTS' RETURN

New York State Resident Income Tax Return for the calendar year 1934, filed by James B. O'Keefe, verified April 12, 1935.

A statement as to the material facts of this exhibit is printed herein at page 55, as part of the stipulation dispensing with the printing of the entire exhibit.

EXHIBIT 2, ANNEXED TO RESPONDENTS' RETURN

Claim for refund, filed by James B. O'Keefe, verified August 16, 1935, for calendar year 1934, amount \$57.28.

A statement as to the material facts of this exhibit is printed herein at pages 55-56, as part of the stipulation dispensing with the printing of the entire exhibit.

EXHIBIT 3, ANNEKED TO RESPONDENTS' RETURN

Application for formal hearing, filed by James B. O'Keefe.

A statement as to the material facts of this exhibit is printed herein at page 56, as part of the stipulation dispensing with the printing of the entire exhibit.

[fol. 21] EXHIBIT 4, ANNEKED TO RESPONDENTS' RETURN

In the Matter of the Application for Revision of the 1934
Income Tax of JAMES B. O'KEEFE

Formal hearing had at the Albany office, Income Tax Bureau, Department of Taxation and Finance on October 14, 1935.

Appearances for the Taxpayer:

Mark A. Bogart, % Bogart, Calise & DiPrima, Counselors at Law, 38 Park Row, New York, N. Y., and Eli Phillips, % Bogart, Calise & DiPrima, Counselors at Law, 38 Park Row, New York, N. Y.

Appearances for the State Tax Commission:

Deputy Commissioner Cortland A. Wilbur and First Assistant Director Roy H. Palmer.

Mr. Bogart: Mr. James B. O'Keefe, the petitioner herein, has been employed by the Home Owners' Loan Corporation since January 25, 1934. The Corporation itself was created as an instrumentality of the United States, which shall have [fol. 22] authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules and regulations as the Board may prescribe for the accomplishment of certain purposes set forth in the Act.

Mr. O'Keefe was employed as an examining attorney during the year 1934 for the purpose of assisting in carrying out the purposes for which the Corporation was created and has, of course, been an employee of the corporation for the years 1934 and 1935. He paid an income tax in the sum of \$57.28 for the year 1934. Included in the calculations determining the tax was an item of \$2246.66 earned by Mr. O'Keefe in his capacity as examining attorney for the Home Owners' Loan Corporation during the year 1934. It is the contention of the petitioner that he is exempt from taxation on his income earned in the Home Owners' Loan Corporation by the State of New York because he was an employee of the Federal government and as such was exempt from paying a state income tax.

JAMES B. O'KEEFE, being duly sworn by Deputy Commissioner Wilbur testified as follows:

Examination by Mr. Bogart:

Q. Mr. O'Keefe, are you now employed by the Home Owners' Loan Corporation?

A. Yes.

Q. When did you begin your employment with that Corporation?

A. I was certified in Washington on January 25, but I started to work on January 12, 1934 and the period from January 12 to the 25th I did not receive my salary for that until this year. Of course, that will come in this year. [fol. 23] That was \$80.00 which I did not receive until two or three months ago.

Q. During 1934 what was your position?

A. Examining Attorney.

Q. You go to work at nine o'clock every morning?

A. Yes.

Q. And work until five?

A. Yes; from nine to five on week days and nine to twelve on Saturdays.

Q. What were your duties as examining attorney?

A. When I started first we examined the files before the attorneys closed them for the last year now—

Mr. Bogart (interrupting): Limit yourself to 1934.

A. I do not just recall when we changed.

Q. You changed in June, didn't you?

A. June 1934 and we changed and examined the files after they had been closed and checked the file before they were sent to Washington.

Q. Your position is to examine the file to determine whether or not the Corporation has a first lien?

A. Yes.

Q. And also to determine the merit of the application itself?

A. Yes.

Q. In your capacity as examining attorney and as supervising attorney for the Home Owners' Loan Corporation you, of course, assisted in the performing of duties of the Corporation as set forth in the Act?

A. Yes.

Mr. Bogart: I have a letter of the Personal Supervisor of the Home Owners' Loan Corporation certifying that Mr. O'Keefe is an employee and the date of his employment. I offer this in evidence.

[fol. 24] (Letter dated October 5, 1935, signed by Joseph M. Byrne, Personal Supervisor, Home Owners' Loan Corporation, accepted in evidence and marked Exhibit "A".)

Q. For the year 1934, you paid a tax on an income of \$2908.54, net income? Is that right?

A. Yes.

Q. And of that amount the sum of \$2246.66 was earned by you as an employee of the Home Owners' Loan Corporation and a tax of \$57 28 paid and you now claim exemption on the ground you were not subject to the tax because you were an employee of the Home Owners' Loan Corporation and, therefore, an employee of the Federal Government? Is that right?

A. Yes.

Q. You are not married?

A. I am a widower.

Q. After deducting the sum of \$2246.66 from the net income earned by you during 1934, you would then have the sum of \$661.88 which would be less than \$1,000 which is the personal exemption allowed by law?

A. Yes.

Q. So if you are exempt from payment of any tax because you are a Federal employee the sum paid by you, to wit,

\$57.28 is the sum paid which is not due to the State government?

A. Yes.

Q. And you now demand the return of the tax paid by you? A. I do.

MR. JAMES B. O'KEEFE being questioned by Mr. Palmer testified as follows:

Q. Mr. O'Keefe, from whom did you receive your appointment?

A. Mr. Dorsey.

Q. Who is he?

A. The State Counsel of the Home Owners' Loan Corporation.

Q. Was that his title at the time you received this position?

A. I think he was District Counsel; Metropolitan District Counsel.

[fol. 25] Q. You received a written appointment from him?

A. Why, I—

Q. You received a designation on the 25th day of January 1934 from whom?

A. I was only told I was designated in Washington.

Q. Did you receive a written designation at any time?

A. No. My recollection is the fact that I was paid from that date.

Q. And you received no formal appointment, just by word of mouth from Mr. Dorsey?

A. Yes, and I received my check from Washington which was approval of the appointment.

Q. You did not try a Civil Service Examination?

A. No. None were under Civil Service.

Q. Did you take an oath of office?

A. Yes.

Mr. Bogart: Is this a copy of the oath you took?

A. Yes.

Mr. Bogart: I will offer that in evidence.

Mr. Palmer: I do not think this should be received in evidence. It is merely a form. I do not think that is good evidence.

Mr. Bogart: At this time I reserve the right to incorporate in the record the exact oath of office taken by Mr. O'Keefe and this is offered as the wording of the oath which Mr. O'Keefe took.

Mr. Palmer: Could you get a certified copy and file it?

Mr. Bogart: I will get a certified copy.

Examination of taxpayer.

By Mr. Palmer resumed:

Q. Mr. O'Keefe you performed or perform your duties under the direction of whom?

A. Mr. Thomas G. Grace.

Q. What was his title?

A. When I started it was under Mr. Dorsey, Leo P. [fol. 26] Dorsey who was Metropolitan District Counsel and he was succeeded by Thomas G. Grace and now I am under Joseph Sanner.

Q. You are paid how?

A. Semi-monthly.

Q. By check?

A. Yes.

Q. Who are these checks signed by? What is the form?

A. It is the United States Treasury Department. I never looked.

Q. Are they the checks of the Home Owners' Loan Corporation?

A. It is the United States Treasury Department, isn't it?

Mr. Bogart: The check is signed by P. J. Mahoney, Treasurer of the Home Owners' Loan Corporation and is drawn on the Treasury of United States.

Mr. Palmer: It is a check of the Home Owners' Loan Corporation.

Mr. Bogart: It appears to be. May I offer in evidence the Home Owners' Loan Act of 1933 as amended, preserving the right to use any portion thereof as may be necessary in purposes of appeal to any of the Courts.

(Accepted in evidence and marked Exhibit "B".)

May I also reserve the right to introduce the Manual of the Home Owners' Loan Corporation with the right to use so much thereof as may be necessary for the same purposes? We will have to leave this hearing open until I can submit

documentary evidence. We will reserve our rights to establish the principal contentions of the petitioner and we reserve our rights to set forth to the Commission the various points which we believe support our position that Mr. O'Keefe is exempt from taxation on his income by the State government.

[fol. 27] Mr. O'Keefe, in February 1, 1935 you were re-classified?

Mr. O'Keefe: I was classified as a supervising attorney.

Mr. Bogart: And your salary was fixed at \$2400?

Mr. O'Keefe: That is right.

Mr. Bogart: And was there put into effect on February 1, 1935 a 5% reduction on your salary?

Mr. O'Keefe: Yes.

Mr. Bogart: And that was a reduction which all Federal employees were receiving on their gross salary at that time?

Mr. O'Keefe: I understand so. I know in my particular case it was.

Mr. Palmer: Was that restored to you later?

Mr. O'Keefe: Yes.

Mr. Bogart: And you are now receiving the full \$2400?

Mr. O'Keefe: Yes.

Mr. Palmer: What had you been receiving before February 1, 1935?

Mr. O'Keefe: \$2400.00.

Mr. Bogart: Can I offer at this time for the record a case in which it was held that the salaries of the employees of the Home Owners' Loan Corporation are not subject to garnishment?

Mr. Palmer: It seems to me you do not need to do that to prove your facts. You can have that in your brief.

Mr. Bogart: But I want to offer it to you. I will send you that and let you have it for your purposes. I do not find it here.

MBL.

[fol. 28] EXHIBIT "A" TO TRANSCRIPT OF TESTIMONY OF
OCTOBER 14, 1935

State Office,
Home Owners' Loan Corporation,
401 Empire State Building,
New York City

October 5, 1935.

Department of Taxation & Finance, Albany, New York.

Att. Income Tax Bureau

GENTLEMEN:

Please be advised that James B. O'Keefe has been employed by the Home Owners' Loan Corporation since Jan. 25, 1934.

During the year 1934 he earned and received, as compensation for his services to the Home Owners' Loan Corporation, the sum of \$2,246.66 as Examining Attorney.

Very truly yours, (Signed) Joseph M. Byrne, Personal Supervisor.

JMB:AH.

EXHIBIT "B-1" TO TRANSCRIPT OF TESTIMONY OF OCTOBER 14,
1935

Home Owners' Loan Act of 1936, as Amended
(Omitted Pursuant to Stipulation)

[fol. 29] EXHIBIT 5, ANNEXED TO RESPONDENTS' RETURN

[Same Title]

Formal hearing had at the New York Office, Income Tax Bureau, Department of Taxation and Finance, on February 23, 1936, at two o'clock in the afternoon.

This is a Continuation of a formal hearing held in this matter on October 14, 1935.

Appearances for the Taxpayer:

Mark A. Bogart, % Bogart, Calise & DiPrima, Counselors-at-Law, 38 Park Row, New York, N. Y., and Eli Phillips, % Bogart, Calise & DiPrima, Counselors-at-Law, 38 Park Row, New York, N. Y.

Appearances for the State Tax Commission:

First Assistant Director Roy H. Palmer.

Witness: Leo P. Dorsey.

Harriet Zobel, Hearing Steno.

NOTE.—Copy of the Federal Home Loan Bank Act as Amended and the Home Owners' Loan Act of 1933 as Amended, published under date of May 28, 1935, is to be substituted for the copy filed as Exhibit "B" in the former hearing, and will be marked Exhibit "B-1".

[fol. 30] LEO P. DORSEY, being duly sworn by Mr. Palmer, testified as follows:

Examination by Mr. Bogart:

Q. Mr. Dorsey, your position is that of State Counsel to the Home Owners' Loan Corporation in the State of New York, is that right?

A. It is.

Q. How long have you been identified with the Corporation?

A. Since its organization or inception in the State of New York, July, 1933.

Q. And in your capacity as State Counsel and any other position you might have held during that period, you have become familiar and are familiar with the operations of the Corporation in the State of New York?

A. Yes.

Q. I show you this manual and ask you to identify this as a manual of the rules and regulations of the Corporation.

A. Yes, it is.

Q. The official manual?

A. The official manual of the Corporation governing the operation of the Corporation in the State offices.

Mr. Bogart: I offer in evidence the Manual, "Rules and Regulations of the Home Owners' Loan Corporation", spe-

cifically reserving the right to use only such portions thereof as we deem essential for the purposes of this proceeding and the appeal to the Courts, and with the privilege of substituting in its place an exact copy or duplicate of this Manual.

Mr. Palmer: It may be admitted.

Q. Mr. Dorsey, I ask you to identify this as HOLC Form No. 71, revised as of June 7, 1935, which is obtained for and is essential to the closing of any loan by the Corporation in the State of New York.

A. I so identify it, and it is used in all cases where we [fol. 31] close or grant loans to applicants.

Mr. Bogart: I offer in evidence a blank form of Form 71.

Mr. Palmer: The Manual, "Rules and Regulations of the Home Owners' Loan Corporation" will be marked for identification as Exhibit "C".

(Form 71 is received and marked as Exhibit "D".)

Mr. Bogart: I will read from page 1 of the Manual part of the statement of John H. Fahey, Chairman of the Board of the Home Owners' Loan Corporation:

"The Home Owners' Loan Corporation was created to meet an emergency. Its function is to extend relief to distressed home owners who are in imminent danger of losing their homes through foreclosure; or, who, having no mortgage on their property, find it impossible to obtain money from established lending agencies with which to pay taxes and other encumbrances, or to provide for the necessary maintenance or re-conditioning of their home property."

Examination by Mr. Palmer (Mr. Dorsey testifying):

Q. Mr. Dorsey, has the Home Owners' Loan Corporation a separate organization for the State of New York?

A. The operations of the Home Owners' Loan Corporation are carried out in each of the forty-eight states by Separate State organizations, none of the officers or employees of one state having any authority or functions to [fol. 32] perform in another state. In that respect, it is a separate entity in the State of New York and in each of the other forty-eight states, qualified in this one respect: That over the State Office there is what we call a Regional Office throughout various regions of the United States, the local

region being the region of New York, New Jersey and Connecticut, but the State organization, as such, is a separate entity.

Q. Where does this Regional organization have its principal office?

A. It so happens that it has its principal and only office in New York City.

Q. At the same address where the New York State organization is?

A. No, separate addresses—the State organization is on Fifth Avenue; the Regional organization is on Forty-Second Street.

Q. Who is the head of the State organization?

A. Vincent Dailey is the State Manager.

Q. And who is the head of the Regional organization?

A. Merrill Hunt is the Regional Manager.

Q. What jurisdiction does the Regional Office have over the New York unit?

A. It has more or less of a supervisory jurisdiction over the State Office. The Regional Offices grew up in this way: Originally it was contemplated that each of the forty-eight State organizations would report directly to Washington. On account of the volume of business and the necessity for a tremendous organization in Washington to keep in contact with each of the forty-eight State organizations, the Washington Office decided to more or less divert some of the functions that would ordinarily be conducted in Washington to the Regional Offices to take away some of the burden of the detailed supervision from the Washington Office.

Q. Do the Regional Offices have anything to do with the appointment of employees or officers of the New York State organization?

A. It has nothing to do with such appointments except in a supervisory way. In every instance the state organization recommends the appointment of officers and employees. The recommendation goes to the Regional Office. It is approved or criticized, as the case might be, and then when it has met the approval of the Regional Office, it is submitted to Washington. The appointments are submitted to Washington for approval in most of the instances by the Board of Directors. The Regional Office is more or less of a clearing house.

Q. How far down the line of employees does that go?

A. That goes down to the smallest employee, whether he is a messenger boy or an order clerk.

Q. And when you say that it must go to Washington, you mean that it must go to the main office of the Home Owners' Loan Corporation?

A. Yes, we are now speaking of appointments.

Q. Yes. Does the Regional Office have anything to do with the approval or disapproval of loans made by the New York unit?

A. No, it does not. The State Office is a complete functioning office in so far as the processing of applications for loans is concerned, with a few qualifications. There are some cases where the regulations from the Home Office require that certain definite cases, which are a very minor [fol. 34] percentage of the cases, must go to the Home Office for approval. Very recently that has been changed—within the past ten days—so that they now go to the Regional Office instead of the Home Office. On the other hand, there are certain qualifications to that new set-up, so that the Regional Office in certain cases must again submit them to Washington, but that covers a very minor percentage of the loans.

Q. The New York State organization is not a separate corporation, is it?

A. Oh, no, there is but one corporation.

Q. And I assume that being a Federal organization, the Home Owners' Loan Corporation did not have to apply to the State of New York for the right to carry on business within the State?

A. That's correct, and the Home Owners Act specifically provides that it shall not be subject to restrictions placed upon corporations by the various states, except that it is required to pay real estate taxes on property actually owned by the corporation.

Q. Coming to the New York organization, how many offices does it maintain in the State?

A. At present it maintains five offices in the State: New York City, Albany, Syracuse, Rochester and Buffalo.

Q. Each in charge of a manager?

A. Each of those offices is an autonomous fully functioning office under the direction of the State Manager, each office being in charge of a District Manager.

Q. And each performing similar functions in their district?

A. The functions are the same in each district.

[fol. 35] Q. All appointments to positions in those district offices are made how?

A. They are recommended to the State Manager by the District Manager. The State Manager in turn recommends them to the Regional Office, and the Regional Office in turn recommends them to Washington. Originally, the Board of Directors passed upon each employee of the Corporation. I understand that within recent months it has been changed, so that while the Washington Office passes on all appointments, certain low-salaried brackets have been eliminated in respect to those appointments having to go before the Board.

Q. I take it that the District Manager or the State Manager at least can put people to work by an appointment, which is subject to the approval of the Board of Directors, is that so?

A. To a very, very limited extent. Originally, when we set up our organization, that was true, but now that we have the organization well set up and smoothly running, it would be in the most unusual cases of emergency where a District Manager could make an appointment.

Q. How are the expenses of the office paid other than salaries?

A. The expenses of the office are paid always by checks on the Treasury of the United States, signed by the Treasurer of the Corporation.

Q. Are the Home Owners' Loan Corporation checks drawn on the Treasury of the United States?

A. That's right.

Q. Are the expenses of the offices paid upon vouchers for each item, or is each District Office or the State unit entitled [fol. 36] to draw checks and be reimbursed by the Corporation for those expenses?

A. No, neither the State nor the District Offices has a checking account; all checks are drawn against vouchers.

Q. Now, coming to the method of handling loans, to what class of risks may loans be made by the HOLC?

A. In answering that question, I would like to point out that the word "loan" or "loans" should be used in a qualified sense. The operations of the Home Owners' Loan Corporation are more of a refunding or refinancing operation than a loaning operation. For example, a person could own a piece of home property free and clear of any indebtedness

or taxes, and such person could not and would not be eligible for a loan on that unencumbered property. Rather, the Corporation refunds on a long term basis existing mortgages and taxes, both of which are in default when the home owner is actually in distress, cannot obtain mortgage financing elsewhere, and establishes to the Corporation's satisfaction that he is in distress, that he cannot refund elsewhere, and that the property is otherwise within the limitations of the Home Owners' Loan, such as being not more than a four-family house, being the home owner's actual homestead, being valued by the Corporation at an excess of \$25,000, etc. In other words, it is a refunding operation, rather than a direct loaning operation. In no case does the applicant home owner receive money directly from the Corporation. It is always paid to the home creditors such as mortgages or judgment creditors or to the taxing subdivisions.

[fol. 37] Mr. Bogart: Mr. Dorsey, when you say that the home owner is unable to re-finance or refund his indebtedness elsewhere, do you mean to refund it through private lending institutions that are ordinarily engaged in the loaning of moneys on real estate such as banks and mortgage companies?

Mr. Dorsey: No, not necessarily if he has any means of refunding his obligations, whether it be through the ordinary lending channels or through relatives, friends or otherwise.

Mr. Bogart: But it specifically includes lending institutions like banks, trust companies and mortgage companies.

Mr. Dorsey: It does.

Mr. Bogart: So that in any given case where it would appear that the applicant is able to obtain a loan from any private institution which would permit him to carry on the indebtedness on his property, or to refund the indebtedness, then in that case the applicant is ineligible.

Mr. Dorsey: That's right.

Q. But it makes no difference whether the mortgage is an institution, corporation or an individual, so long as the owner of the property is in distress and cannot find any means of refunding the indebtedness?

A. That's right.

Mr. Bogart: Does that include any provisions for advancing money for repairs or improvements?

Mr. Dorsey: Yes, the Corporation is authorized, in con-[fol. 38] nection with refunding a home owner's home mortgage obligations, to make advances for necessary repairs, and, in some instances, for the improvement of home properties. Again, these advances are not to the home owner, but to the contractor who does the work.

Q. But that in itself, though, becomes an advance outside of the mortgage obligations, does it not?

A. Technically, yes, but, practically, no, for the simple reason that in granting or making these refunding loans, it is necessary for the Corporation to see that its security is in a good state of repair.

Q. But assuming that a home owner had a piece of property which was mortgaged to the bank for we assume sixty per cent of its value, and it was assumed that the security was entirely good for the amount of the loan, could the home owner then come to the HOLC and borrow money to put an addition on the house or to put a new heating system in, and obtain an advance from the HOLC for that purpose?

A. Provided he came within the rules and regulations and restrictions set up by the Corporation, he could get such an advance.

Q. So that would not be a refunding operation?

A. That's true, except those operations, those actual improvement cases are so few in number that they are practically negligible.

Q. But the HOLC is authorized to make such advances?

A. That's right.

Q. And while the advances are made direct to the contractor, nevertheless the HOLC takes back a mortgage or some other obligation from the owner?

[fol. 39] A. Yes, the amount so advanced is included in the bond and mortgage.

Mr. Bogart: But would that be true in a case, Mr. Dorsey, where we don't already have a mortgage on the home of the applicant?

Mr. Dorsey: In no case would we make such an advance for improvement unless there was either a mortgage to the Corporation in existence or one being put on simultaneously with the advance in connection with a refunding operation of the existing mortgage.

Q. In other words, the advance would only be made in a case where the owner could not obtain the funds elsewhere.

A. That's right.

Mr. Bogart: If I understood Mr. Palmer correctly, Mr. Palmer indicated a case where the mortgage was held by a bank and the applicant desired a loan for improvement of his property aside from the refunding of the mortgage which the bank held.

Mr. Dorsey: I am afraid I misunderstood Mr. Palmer's question. In the case that Mr. Palmer outlined, we would not grant any advance for repairs or improvement.

Mr. Bogart: In other words, no advance is ever made except in connection with the refunding of the liens against the premises and where it appears that the applicant is in distress and cannot refund or re-finance the indebtedness elsewhere, or where the Corporation makes an advance in a case where it already has given a loan to the applicant, [fol. 40] that advance being for the purpose of preserving the security.

Mr. Dorsey: That is so. In other words, no refunding loan is made, no advances for repairs or improvements are made unless the elements of distress are present and unless any advances for repairs or improvements are carried out in connection with the refunding of the defaulted existing encumbrances.

Q. I understood you, Mr. Dorsey, to say that if property was already encumbered by a mortgage to the extent that the owner could not raise additional funds for improvement on that property, that advances might be made for improvements by the HOLC, even though the HOLC was not attempting to refund or refinance that property.

A. I am afraid that I misunderstood your question, and therefore I gave the incorrect answer. Again repeating in the case which you just outlined, we would not make such an advance.

Mr. Bogart: I show you a copy of Exhibit "D", and ask you to identify it as an exact duplicate of the exhibit on record.

Mr. Dorsey: I so identify it.

Mr. Bogart: Mr. Dorsey, is this form, property executed by the home owner, required in every instance where a loan is made?

Mr. Dorsey: Yes.

Mr. Bogart: And the form is obtained before any loan is approved by the Corporation?

[fol. 41] Mr. Dorsey: Yes. I might qualify that in this way. Originally, the Act provided that if the mortgage was held by a bank or other financial institution in liquidation, the element of distress would not have to be proven, but the Act has been amended in that respect for several months last past.

Q. Up to what point are loans made on property, that is, what is the percentage of equity or of value of property against which such loans are made?

A. The Corporation is permitted to loan up to eighty per cent of the Corporation's appraised value of the property, the maximum loan being \$14,000.00. On the other hand, not every loan is an eighty per cent loan. There might be certain features of the property whereby the Corporation would limit the loans below the eighty per cent to which it is authorized to go.

Q. Do you mean in that case that if the existing loans were more than eighty per cent of the appraised value of the property that the HOLC could give no relief to the owner?

A. Oh, no, not at all. In most instances the mortgagees realize in such cases that the property is probably over-mortgaged, and they are, therefore, willing to adjust the amount of indebtedness to them to come within the amount that we feel we can loan on the property.

Q. Now, the employees of the HOLC conduct all of the negotiations for these loans with the home owners, make appraisals of the property, search the titles, and perform all the functions necessary to carry out the loans or the [fol. 42] making of loans or the denial of the applications for loans?

A. The Home Owners' Loan Corporation work is carried on by two classes of people: one class is referred to as salaried employees—full time employees working for fixed monthly salary. Other functions are carried by fee personnel, people who get paid per case that they work on for a stated amount. Consequently, all of the routine office work in connection with the processing of a loan application is done by salaried employees, except one appraisal, which is made by a fee appraiser, and a re-conditioning or repair inspection likewise done by a fee inspector, and the title closing which is done by an attorney on a fee basis. In

connection with the title search which you mentioned, that is carried out in two ways: In Metropolitan New York, the Corporation obtains the Certificates of Title from a title or abstract company, and furnishes them to the fee attorney who closes the loan. Up State New York the fee attorney either prepares or procures at his own expense the abstract of title.

Q. Mr. O'Keefe, the taxpayer here, was an attorney, and as I understand his testimony, he had something to do with searching titles, is that correct?

A. Well, he reads titles, that is the certificates which were sent in by the title companies, and they would be looked at, read and examined before sending the file to the closing attorney to see if there were any defects in title, particularly defects that could not be cured, and, likewise, to examine the Certificates of Title after the return of the file by the [fol. 43] closing attorney prior to the loan closing, in order to see that all objections and defects were properly disposed of by the closing attorney.

Mr. Bogart: Mr. O'Keefe testified that he was employed first as an examining attorney, and, subsequently, as a supervising attorney, and there was submitted in evidence a letter dated October 5, 1935, signed by Joseph M. Byrne, Personnel Supervisor, evidencing the same. Is that right, Mr. Dorsey?

Mr. Dorsey: That's right.

Q. Were any of the employees of the HOLC in 1934 under Civil Service?

A. The employees were not under Civil Service. Your question is susceptible to two answers. Some of them might have been Civil Service employees working for us, but none of the employees of the Home Loan are subject to Civil Service.

Q. Yes. Have they been put under Civil Service since 1935?

A. Not that I know of.

Mr. Palmer: I think that is all I wanted to ask.

By Mr. Bogart (Mr. Dorsey testifying):

Q. There is no solicitation of business by the Corporation, is that right?

A. Absolutely not; as a matter of fact, we try to discourage the granting of loans, and wherever we can find a home

owner who is ineligible for a loan because of lack of distress, or for any other reason, we endeavor to get other private lending agencies to refund his obligations for him. [fol. 44] Q. And in cases where it appears definitely that there is no distress, is it the policy of the Corporation to refer those cases to various private lending institutions?

A. It is. The Corporation has had for many months in operation a Department whose sole functions are to contact savings and loan associations, savings banks and lending companies, advising them of many applicants that have been rejected by the Home Owners' Loan Corporation that would eventually make sound loans, sound investments for such other lending institutions, and the other lending institutions have refunded many such applications.

Q. Is it correct to say, Mr. Dorsey, that it is not the purpose of the Home Owners' Loan Corporation to make a profit?

A. That's correct. The purpose of the Corporation is to relieve distress, and to keep people in their homes in times of a National emergency.

Q. And, accordingly, the rate of interest is fixed so that the difference between the rate charged to the home owners and the rate paid on account of the bonds issued by the Corporation is to pay for the operating expenses of the Corporation?

A. That's right.

Q. The fixing of the rate of interest in no way depends upon the current rate of interest that prevails where a private lending institution might loan money on similar liens; in other words, where a private lending institution might give a particular home owner a loan and take back as security a mortgage on the premises of the home owner, the fact that the lending institution might charge five or six per cent interest does not affect the rate which is fixed [fol. 45] by the Home Owners' Loan Corporation?

A. No, because our rate is fixed by statute.

Mr. Palmer: What rate is charged by the HOLC?

Mr. Dorsey: Five per cent for a—let me answer that. We are authorized to make and carry out our refunding operations by exchanging our bonds for the mortgages held by the mortgagees on the homes of the distressed home owners. Where the mortgagee accepts the bonds, we charge five per cent interest to the home owner. There is another negligible class of cases—I think we have only had six of

them in New York State—where the mortgagee will not accept our bonds in exchange for his mortgage. We are under very limited and very strict restrictions permitted to advance cash to the mortgagee. In that case, we charge six per cent interest, but that category can entirely be eliminated, because there are only six or seven cash loans in the State of New York out of the seventy-eight thousand total loans that we have made.

Q. In the event that it appears that the Corporation is making a profit, has Congress the power to reduce the rate of interest?

A. I assume that it has.

Mr. Palmer: I have no further questions, Mr. Bogart.

Mr. Bogart: Neither have I.

(Hearing adjourned.)

[fol. 46] EXHIBIT "C" TO TRANSCRIPT OF TESTIMONY OF
FEBRUARY 28, 1936.

Excerpts from manual of rules and regulations of Home
Owners Loan Corporation.

Purpose of the Home Owners' Loan Corporation.

"As a further and urgently necessary step in the program to promote economic recovery, I ask the Congress for legislation to protect small house owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power. Implicit in the legislation which I am suggesting to you is a declaration of national policy. This policy is that the broad interests of the Nation require that special safeguards should be thrown around home ownership as a guaranty of social and economic stability, and that to protect home owners from inequitable enforced liquidation, in a time of general distress, is a proper concern of the Government."—President Franklin D. Roosevelt in his message to Congress, April 13, 1933.

Preface—Page 1

The Home Owners' Loan Corporation was created to meet an emergency. Its function is to extend relief to distressed

home owners who are in imminent danger of losing their homes through foreclosure or, who having no mortgage on their property, find it impossible to obtain money from established lending agencies with which to pay taxes and other encumbrances, or to provide for the necessary maintenance [fol. 47] or reconditioning of their home property.

Mortgage distress is a financial condition. It can also be a state of mind. Many are mentally in mortgage distress who are not financially so. If a mortgage loan will be carried by the present mortgagee without foreclosure, or the mortgage burden can be financed elsewhere, then the loan is not eligible in the Home Owners' Loan Corporation and must not be granted.

Ch. III—p. 5

(5) Form No. 71—(a) Compliance with Section 4-1 of the H. O. L. C. Act, as Amended, requires that Form No. 71 must accompany each application.

(b) In all cases where applications were taken prior to April 27, 1934, and which have not been advanced to the Legal Department the applicants must be called in and their execution of Form No. 71 required before such applications are approved for further progress. When such cases have been advanced to the Legal Department, the closing attorney must have Form No. 71 executed prior to closing.

(c) With respect to new applications, it is required that the applicant execute Form No. 71 prior to advancing the case beyond the Application Section. The execution of Form No. 71 should be accomplished only after a thorough consideration and understanding of the significance of this form.

[fol. 48] (6) Evidence of Inability to Refinance—Responsibility shall remain upon the State Manager and his assistants to see to it that applicants have made reasonable efforts to refinance their mortgages through other channels and to determine as a matter of fact that such applicants in the opinion of the State Manager are unable to refinance through other channels before certificate on Form No. 71 is executed, and no loan shall be permitted by the State Manager when such certificate on Form No. 71 cannot properly be executed.

Ch. V—p. 3

Reconditioning:

1. There shall be a Reconditioning Division, which shall direct and supervise all necessary maintenance and necessary repairs and all maintenance, repair, rehabilitation, rebuilding and enlargement, as is provided in the statute.

2. The Reconditioning Division shall see to it that the owners of property maintain, repair and improve their properties at their own expense for their own protection and for the protection of the Corporation where they are able to do so. Where such owners are unable adequately to maintain, repair and improve their properties the Reconditioning Division shall conduct such work as may be necessary for the full protection, and for the best interests of the Corporation.

Ch. XIV—p. 12.1

[fol. 49] 16. Employees Must Pay Their Debts:

The Home Owners' Loan Corporation is not subject to garnishment.

Ch. XIV—p. 13

17. Salaried Employees Entitled to Benefits of Federal Employees' Compensation Act:

Salaried employees of the Home Owners' Loan Corporation are entitled to the benefits of the Federal Employees' Compensation Act, as Amended (U. S. Code, Title 5, Chapter 15: 39 Statutes at Large 742.)

EXHIBIT "D" TO TRANSCRIPT OF TESTIMONY OF FEBRUARY 28,
1936

HOLC Form No. 71, Revised June 7, 1935

Statement of Applicant for Compliance With Section 4 (1)
of Home Owners' Loan Act, As Amended

Home Owners' Loan Act, as amended, Sec. 8 (a): Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of in-

fluencing in any way the action of the Home Owners' Loan Corporation or the Board of an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both.

_____, _____,
_____ —, 1935.

Application No. —.

Name of Applicant ———.

The undersigned applicant to the Home Owners' Loan Corporation for a loan upon the applicant's home property understands that under the Home Owners' Loan Act of 1933 as amended, he is not entitled to a loan unless the mortgage or other obligation or lien which it is sought to be taken up was in involuntary default on June 13, 1933, with respect to the indebtedness on said property and that he is unable to carry or refund his present indebtedness, or if default occurred after June 13, 1933, that such default was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(1) On June 13, 1933, the following payments on the indebtedness on the applicant's home were in involuntary default:

Principal \$—. Interest \$—. Taxes \$—.

Give date of first default: — —, —.

(2) Applicant was unable to make these payments because
_____.

(3) Since June 13, 1933, applicant has made the following payments on the indebtedness on applicant's home (give dates and amounts):

Principal \$—. Interest \$—. Taxes \$—.

[fol. 51] (4) At present the following payments on the indebtedness on applicant's home are in involuntary default:

Principal \$—. Interest \$—. Taxes \$—.

(5) Applicant has been employed during this period of default for the times and at the places as follows:

Time: ——. Place: —.

(6) Applicant is unable to make the payments now overdue because —.

(7) Applicant has made diligent effort to obtain loan to refund the indebtedness on his home, and has been unable to do so.

(8) Applicant is unable to carry or to refund the indebtedness on his home because —.

(9) Is the loan applied for desired to relieve in part or in whole financial embarrassment in business, or from banking obligations? If so, give details: —.

(10) Is there any agreement between you and the mortgagee at this time in reference to refunding your debt which you have not divulged to this Corporation? If so, state what it is: —.

The applicant makes the foregoing statements in order to induce the Home Owners' Loan Corporation to refund the indebtedness against the applicant's home.

— —, Applicant.

[fol. 52] Form No. 71 taken by — —.

Relying upon above statements and believing them to be correct, I approve the same as in compliance with Section 4 (1) of Home Owners' Loan Act of 1933 as amended.

— —, — —,
Title of Officer of Corporation.

Instructions to be observed for procuring proper execution of above:

The employee of the Home Owners' Loan Corporation who takes the above statements from the applicant must see that each item is answered fully.

The applicant should be advised that any wilful misstatement is a violation of the Home Owners' Loan Act as Amended, and is punishable by fine and imprisonment.

The applicant should be closely questioned as to when the default occurred and the blanks above should be fully filled in.

If the officer of the Corporation is not reasonably satisfied with the truth of the statements made and subscribed by the applicant, then, before proceeding further the officers of the Corporation should take the matter up with the mort-

gagge and others, and investigations should be made concerning the facts.

The approval provided for in the form should be signed by the State or District Manager.

[fol. 53] EXHIBIT 6, ANNEXED TO RESPONDENTS' RETURN

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Joseph Byrne, being duly sworn, deposes and say:-

I am personnel supervisor of the State office of the Home Owners' Loan Corporation and have personal knowledge of the form of oath taken by all employees of the Home Owners' Loan Corporation.

Annexed hereto is an exact copy of the oath of office required to be taken by each employee of the Home Owners' Loan Corporation.

Joseph M. Byrne.

Sworn to before me this 24th day of October, 1935.
Edward Klein, Notary Public, Queens County.
Queens Co. Clerk's No. 3101, Reg. No. 7402. N. Y.
Co. Clerk's No. 871, Reg. No. 7K537. Kings Co.
Clerk's No. 92, No. 7365. Commission Expires
March 30, 1937.

Oath of Office

Prescribed by Section 1757, Revised Statutes of the United States

.....
(Department or Establishment) (Bureau or Office).

I,, do solemnly swear (or
Name in full printed or typed
affirm) that I will support and defend the Constitution of
[fol. 54] the United States against all enemies, foreign and
domestic; that I will bear true faith and allegiance to the
same; that I take this obligation freely, without any mental
reservation or purpose of evasion; and that I will well and
faithfully discharge the duties of the office on which I am
about to enter. So help me god.

(Signature of Appointee:) — — —.

Subscribed and sworn to before me this — day of
 —, A. D. 193—, at (City or Place) —. —.
 (State.) (Seal.)

NOTE.—If the oath is taken before a Notary Public the date of expiration of his commission should be shown.

Position to which appointed —.

Date of entrance on duty — —, —.

[fol. 55] EXHIBIT 7, ANNEXED TO RESPONDENTS' RETURN

Official Correspondence Should be Addressed to the
 Commission

United States Employees' Compensation Commission,
 Washington

Commissioners: — —.

Wm. McCauley, Secretary.

Jewell W. Swofford, Chairman.

November 7, 1935.

In Reply Refer to File No. —

Harry Bassett, John M. Morin, Bogart, Calise & Di Prima,
 Counselors at Law, 38 Park Row, New York, N. Y.

GENTLEMEN :

The Commission has received your letter of November 4, 1935, in which you request to be advised whether under a ruling of the Commission employees of the Home Owners' Loan Corporation have been held to be civil employees of the United States.

Under date of November 27, 1933, the Commission held that regular employees of the Home Owners' Loan Corporation are civil employees of the United States within the meaning of the Federal Employees Compensation Act of September 7, 1916. This decision was communicated to the Chairman of the Board of Directors of the Home Owners' Loan Corporation in a letter dated November 28, [fol. 56] 1933. In keeping with this decision employees of

that Corporation suffering injuries while in the performance of official duty have been extended the benefits authorized by this Compensation Act.

Very truly yours, (Sig.) Wm. McCauley, Secretary.

EXHIBIT 8, ANNEXED TO RESPONDENTS' RETURN

This exhibit is identical with Schedule A, annexed to Petition of James B. O'Keefe, printed herein at pages 8-9.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD
DEPARTMENT

[Title omitted]

STIPULATION AS TO CERTAIN EXHIBITS

It is hereby stipulated by the attorneys for the respective parties hereto that the material facts contained in items 1, 2 [fol. 57] and 3 of the return herein are as follows:

1. In relator's resident income tax return for the calendar year 1934, he reported as taxable income the sum of Two thousand two hundred forty-six and 66/100 (\$2246.66) dollars as salary received as an attorney at law in the employ of the Home Owners' Loan Corporation upon which salary a tax was paid.

2. On August 16th, 1935, relator filed a claim for refund of the tax paid for 1934 in which he stated that his salary from the Home Owners' Loan Corporation was earned by claimant as an employee of the Federal Government engaged in the performance of a governmental function and therefore was exempt from New York State Income Tax; that his total net income for 1934 was \$2908.54 of which \$2246.66 was salary from the Home Owners' Loan Corporation; that, since the salary from the Home Owners' Loan Corporation was not taxable, his net taxable income for 1934 was \$661.88 which was less than the One thousand (\$1,000.00) dollars personal exemption to which he was entitled; that, therefore he was entitled to a refund of the \$57.28 tax he had paid for 1934.

3. On August 16th, 1935, relator filed an Application For Informal Hearing to review and decide the question as to whether or not relator was entitled to a refund of the tax paid for 1934 for the reasons stated in the Claim for Refund.

4. It is further stipulated that said Items 1, 2 and 3 of the Return need not be printed in the record of this proceed-[fol. 58] ing and that this stipulation be printed in their place.

It is further stipulated that Exhibit B-1 to the transcript of testimony of October 14, 1935, consisting of a copy of the amended Home Owners' Loan Act of 1936, be omitted from the printed record.

Dated, September 23, 1936.

Bogart, Calise & Di Prima, Attorneys for Relator.
John J. Bennett, Jr., Attorney General, Attorney
for Respondents.

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss.

William J. Calise being duly sworn says:

I am a member of the firm of Bogart, Calise & Di Prima, the attorneys for the petitioner in this proceeding and am familiar with all the proceedings herein.

No opinion was delivered by the Court below in making the order for the writ of certiorari herein.

William J. Calise.

Sworn to before me this 23rd day of September, 1936.
Jacqueline Leo, Notary Public, New York County.

[fol. 59] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the petition for a writ of certiorari, the order

granting the writ of certiorari, the writ of certiorari, the return to the writ of certiorari, and the exhibits and pertinent and material parts of exhibits annexed to said return, and the whole thereof, which are on file in the office of the Clerk of the County of Albany; and certification thereof is hereby waived.

Dated, New York, N. Y., September 23, 1936.

Bogart, Calise & Di Prima, Attorneys for Relator.
John J. Bennett, Jr., Attorney General, Attorney
for Respondents.

[fol. 60] IN SUPREME COURT OF NEW YORK, COUNTY OF
ALBANY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice that the respondents above named hereby appeal to the Court of Appeals from the final order of the Appellate Division, Third Department, entered in the office of the Clerk of Albany County on the 17th day of January, 1938, which said final order annulled a determination of the respondents denying the application of the relator for a revision and resettlement of the computation of his personal income tax for the calendar year 1934 and for a refund of a portion of said tax; and the said respondents hereby appeal from each and every part of said final order.

Dated, Albany, New York, January 28, 1938.

Yours, etc., John J. Bennett, Jr., Attorney-General of
the State of New York, Attorney for Respondents,
Capitol, Albany, New York.

[fol. 61] To: Daniel McNamara, Jr., Esq., Attorney for
Relator, 322 Ninth Street, Brooklyn, N. Y. Hon. John A.
Knox, Clerk of Albany County, Court House, Albany, N. Y.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation
of JAMES B. O'KEEFE, Relator,
against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
Commissioners constituting the State Tax Commission of
the State of New York, Respondents

ORDER APPEALED FROM—December 29, 1937

A writ of certiorari having been duly granted at a Special Term of the Supreme Court, held in and for the County [fol. 62] of Albany, on the 18th day of April, 1936, to review the final determination of the respondents, Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, denying the application of the relator, James B. O'Keefe, for a revision and resettlement of the computation of his personal income tax for the calendar year 1934, and for a refund of the sum of \$57.28, the said personal income tax paid by the relator for the said calendar year 1934, and the respondents having duly appeared and filed their return thereto, and this proceeding having been duly heard at a Term of this Court, held at the City of Albany, in the State of New York, on the 10th day of November, 1937, and this Court having duly made and filed its decision herein wholly annulling the said final determination, with \$50.00 costs and disbursements, now on motion of Daniel McNamara, Jr., Esq., attorney for the relator, it is

Finally Ordered that the said final determination be and the same hereby is wholly annulled; that the said application be and the same hereby is in all respects granted, and that the respondents refund to the relator the sum of \$57.28, the said personal income tax paid by the relator for the calendar year 1934; and that the relator recover of the respondents the sum of \$50.00 costs and his disbursements of this proceedings, and that the relator have execution therefor.

John S. Herrick, Clerk.

[fol. 63] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

[Title omitted]

ORDER OF SUBSTITUTION OF ATTORNEY—March 9, 1937

On reading and filing the stipulation, dated the 22nd day of March, 1937, signed by Bogart, Calise & DiPrima, Esqs., the attorneys for the relator, and signed and acknowledged by James B. O'Keefe, the relator, it is

Ordered, that Daniel McNamara, Jr., Esq., of 322 Ninth Street, Borough of Brooklyn, City of New York, be and he hereby is substituted as the attorney for the relator in the above entitled proceeding, in the place and stead of Bogart, [fol. 64] Calise & DiPrima, Esqs., of No. 38 Park Row, Borough of Manhattan, City of New York.

John S. Herrick, Clerk.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION. THIRD
JUDICIAL DEPARTMENT

Decision Handed Down 410-16

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. JAMES B.
O'KEEFE, Relator,

v.

MARK GRAVES and Others, as Commissioners, Constituting
the State Tax Commission of the State of New York,
Respondents

DECISION

Determination annulled, with fifty dollars costs and disbursements.

Relator is the regularly retained attorney for the Federal Home Owners' Loan Corporation. His salary is not subject to tax under People ex rel. Rogers v. Graves (299 U. S. 401).

Hill, P. J., McNamee and Bliss, JJ., concur.

Crapser, J., dissents with an opinion in which Heffernan, J., concurs.

[fol. 65] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

410-16

[Title omitted]

DISSENTING OPINION

This is a review, by certiorari, of a final determination of the State Tax Commission denying relator's application for the refund of income tax paid with respect to the calendar year 1934.

Bogart, Calise & Di Prima, Attorneys for Relator, No. 38 Park Row, New York City.

Hon. John J. Bennett, Jr., Attorney General, Attorney for Respondents, Capitol, Albany, N. Y.

[fol. 66] Opinion for Confirmation

CRAPSER, J.:

The relator is a resident of the City of Long Beach, New York. He duly made a personal income tax return pursuant to the Tax Law of the State of New York and paid an income tax of \$57.28 for the year 1934. Thereafter and on or about August 16th, 1935, he duly made application, pursuant to Section 374 of the Tax Law, for a refund of the foregoing tax which was denied by the tax commission.

He bases his claim upon the fact that the tax paid for the year 1934 was based on a net income of \$2908.54 of which \$2,246.66 was salary earned as an attorney at law in the employ of the Home Owners' Loan Corporation which corporation the relator alleges is an instrumentality of the United States Government and that such part of his income as was earned as an employee of the Home Owners' Loan Corporation is exempt from the New York State Income Tax.

Section 4 (j) of the Home Owners' Loan Act of 1933 (June 13, 1933, c. 64, 48 Stat. 128; 12 U. S. C. A. §§ 1461-1468) reads:

"The Corporation shall have power to select, employ and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this Act, without regard to the provisions of

other laws applicable to the employment or compensation [fol. 67] of officers, employees, attorneys, or agents of the United States. No such officers, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board."

The term "Board" as used above means the Federal Home Loan Bank Board.

Under this statutory authority, relator received a verbal appointment from the Metropolitan District Counsel of the Corporation without the necessity of participating in a competitive civil service examination. By statute, provisions of law applicable to officers and employees of the United States had no application to relator's employment.

[fol. 68] The Home Owners' Loan Act is explicit in limiting the loaning functions of the Corporation to a period which expired on June 13, 1936, last. The Corporation, was therefore intended to be only a temporary agency functioning to aid distressed home owners during an emergency period. Its employees, similarly, were intended to have no status other than that of employees of an interim agency with a definitely limited tenure.

In *Peo., ex rel. Rogers v. Graves*, 57 Supreme Court Reporter, 269, the Court said:

"The power of the federal government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *McCulloch v. Maryland*, 4 Wheat 316."

In *Dobbins v. Commissioners of Erie County*, 16 Peters 435, 448, 449; the court held that a state was without author-

ity to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power.

In *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, the court says:

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of [fol. 69] the other. * * * Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests in the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. * * *

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably, has some effect upon the other. * * * Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax or the appropriate exercise of the functions of the government affected by it."

The fact that the federal government has the power to undertake such an enterprise as is provided for by the Home Owners' Loan Act and that it is undertaken for what the federal government conceives to be a public benefit does not establish immunity from taxation by the state of the income earned by its employees. (*Helvering v. Powers*,

293 U. S. 214; *South Carolina v. United States*, 199 U. S. 437; *Indian Motorcycle Company v. United States*, 283 U. S. 570-575.)

South Carolina v. United States, 199 U. S. 437 and *Ohio v. Helvering*, 292 U. S. 360, were both cases where the dispensation of liquor had been taken over by an authority created by a state and claimed their exemption from the federal right to tax under the revenue act. The court, while recognizing the power of the state to enter the enterprise, denied the exemption, as the state could not by engaging in a business of that sort, withdraw it from the taxing power which the constitution vested in the national government.

Immunity from taxation can exist only where the taxation is a direct burden laid upon the instrumentality of government; it does not exist where only a remote influence upon the exercise of the functions of government are found. (*Willcuts v. Bunn*, 282 U. S. 216; *Fox Film Corporation v. Doyal*, 286 U. S. 128.)

The business of the Home Owner's Loan Corporation is a business that has always been carried on by private corporations or individuals.

[fol. 71] The tax has been imposed on the income of the relator who is neither an officer or employee of the United States Government, and whose only relation to it is that he has contracted with the Home Owners' Loan Corporation to furnish his services to them.

It cannot be said that the tax imposed upon the relator is imposed upon an agency of government from any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agency in any substantial way. (*Fidelity & Deposit Company v. Pennsylvania*, 240 U. S. 319; *Railroad Company v. Peniston*, 18 Wall 5; *Gromer v. Standard Dredging Company*, 224 U. S. 362; *Baltimore Ship Building Co. v. Baltimore*, 195 U. S. 375.)

I am not unmindful of the decision in *People of the State of New York ex rel. Rogers v. Graves*, decided on January 4th, 1937, 57 Supreme Court Reporter 269. There was no question in that case but what the building and operation of the Panama Canal were governmental functions and that congress had constitutional power for national defense and to regulate commerce. The court in that case held that the railroad was an auxiliary primarily designed and used to aid in the creation, management and operation of the

Panama Canal and was so closely related to it as to make all of its services a governmental function which the state could not in any way touch by its taxing power.

[fol. 72] The corporation by which the relator was employed was limited as to time and was not a governmental function of such a character as to prevent the state from taxing the income of its employees under its law.

The final determination of the State Tax Commission should be confirmed with costs.

IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the record on certiorari, as filed with the clerk of the Appellate Division, Third Department, the order of substitution of attorneys for the relator, the notice of appeal, the order appealed from, the decision and dissenting opinion of the Appellate Division annulling the determination of the respondents, the same constituting the complete record now on file with the clerk of the County of Albany; and certification thereof is hereby waived.

Dated, Albany, N. Y., April —, 1938.

John J. Bennett, Jr., Attorney-General, Attorney for
Respondents-Appellants. Daniel McNamara, Jr.,
Attorney for Relator-Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 19, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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